Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1994

KATHRYN MOSER and NATIONAL ASSOCIATION OF TELECOMPUTER OPERATORS,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, a federal agency, and JAMES H. QUELLO, in his capacity as Chairman of the Federal Communications Commission,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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May 5, 1995

QUESTION PRESENTED

By prohibiting the use of automatic dialing-announcing devices (ADADs) for commercial speech, while authorizing the Federal Communications Commission to allow the use of ADADs for noncommercial speech, does the Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394-2402 (1991), violate petitioners' First Amendment right to engage in truthful commercial speech under the test set out in *Central Hudson Gas & Elec. Corp. v. Public Service Com'n*, 447 U.S. 557 (1980), or their right to the equal protection of the laws protected by the Fifth Amendment?

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Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioners Kathryn Moser and National Association of Telecomputer Operators respectfully petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported in 46 F.3d 970 (1995), and is reprinted in

the appendix, p. A-1, *infra*. The opinions of the United States District Court for the District of Oregon are reported at 826 F. Supp. 360 (D. Or. 1993) (granting permanent injunction) (A-13, *infra*) and at 811 F. Supp. 541 (D. Or. 1993) (granting preliminary injunction) (A-34, *infra*).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 6, 1995. (A-1.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394-2402 (1991), codified at 47 U.S.C. § 227 ("TCPA" or "the Act"), provides in pertinent part as follows:

> "(1) PROHIBITIONS. It shall be unlawful for any person within the United States -
>
> ****
>
> "(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

****

"(2) REGULATIONS; EXEMPTIONS AND OTHER PROVISIONS. The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission --

****

"(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe --

"(i) calls that are not made for a commercial purpose; and

"(ii) such classes or categories of calls made for commercial purposes as the Commission determines --

"(I) will not adversely affect the privacy rights that this section is intended to protect; and

"(II) do not include the transmission of any unsolicited advertisement." 47 U.S.C. § 227(b).

The full text of the pertinent portions of the Act is reproduced in the Appendix, A-47, *infra*.

Pursuant to the authority given it to exempt "calls that are not made for a commercial purpose" from the prohibitions of the Act, the Commission promulgated rules that did just that. In a proceeding entitled *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 92-443, CC Docket No. 92-90 (released October 16, 1992), the Commission promulgated 47 C.F.R. § 64.1200. In pertinent part, that section reads as follows:

> "(a) No person may
>
> ****
>
> "(2) Initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by § 64.1200(c).
>
> ****
>
> "(c) The term 'telephone call' in § 64.1200(a)(2) shall not include a call or message by, or on behalf of, a caller:
>
> "(1) that is not made for a commercial purpose,

"(2) that is made for a commercial purpose but does not include the transmission of any unsolicited advertisement,

"(3) to any person with whom the caller has an established business relationship at the time the call is made, or

"(4) which is a tax-exempt nonprofit organization."

STATEMENT OF THE CASE

A. Introduction

An automatic dialing-announcing device (ADAD) is a computer connected to a telephone line that can automatically dial telephone numbers without the assistance of a live operator, and then play a recorded message when the call is answered. Petitioners use ADADs to advertise their goods and services to residential telephone subscribers.

In this case, petitioners challenge those parts of the TCPA set out above, which prohibit the use of such machines for the transmission of truthful advertising messages from commercial users, but which authorize the FCC to permit the use of such machines for the transmission of all kinds of messages from noncommercial users and of advertising messages from nonprofit users.

B. Statement of Facts

In 1987, petitioner Kathy Moser, with her husband, Ronald Moser, started a chimney sweep business in Salt Lake City, Utah, using funds that Mrs. Moser had received when she took early retirement, as an alternative to being laid off, from her job as a technical assistant at US West. (Preliminary Injunction Hearing, December 17, 1992, Tr. at 11-12.) The Mosers first advertised their new business by means of newspapers and door-to-door flyers. That advertising was not cost-effective; their business was "deteriorating quickly," even though they started their business in the fall, "the busiest time of the year" for chimney cleaners. (*Id.* at 13.)

So the Mosers tried something else. Mrs. Moser testified:

> "We saw an ad for a telecomputer that would generate leads for us, so we took the last bit of capital we had on a rent-to-own basis to see if it would generate the leads that it said that it did. And so we rented a telecomputer for * * * one month to see whether it worked or not. The first week it made its rental payment." (*Id.* at 14.)

In August 1989, the Mosers moved to Oregon, for reasons relating to Mrs. Moser's health (*id.* at 15), and they now operate their business under the name AAA-1 Lucky Leprechaun in Salem, Oregon. (*Id.* at 13.) In their new location, they advertised with door-to-door flyers, with their

ADAD, and in the Yellow Pages. (*Id.* at 15.) Seventy percent of their business is generated through calls made by their two ADADs. Without the revenues generated by those machines, they would be unable to afford even the cost of advertising in the Yellow Pages. (*Id.* at 16-17.)

Mrs. Moser also uses her ADADs "for our church to call on social functions and activities. * * * When we use the computer, we get a lot more people out to our functions and various meetings." (*Id.* at 17.)

Each ADAD used by the Mosers can dial only one telephone number at a time, and it dials only those numbers that have been programmed into it by Mrs. Moser. She can program in entire exchanges (that is, all numbers beginning "224-" or "248-," for example), portions of exchanges, or individual numbers; "[i]t just depends on what *** I choose to do." (*Id.* at 18.)

She does not program into the ADADs the exchanges that contain the numbers for government offices, hospitals, or the local university. And in those exchanges that she does program into the ADAD, she deletes the numbers for any emergency services whose telephone numbers are within that exchange. (*Id.* at 18-19.) Earlier ADAD models did not have the technological capacity to omit any numbers in a given exchange; they would indiscriminately dial through the entire sequence. (Affidavit of Carl R. Kolker, November 7, 1992, ¶ 3.)

Mrs. Moser's machine is programmed so that "once it has dialed a number and someone has answered it and

hung up the telephone, it will never dial it again." That is true even if she has inadvertently programmed the same number into the ADAD more than once, for "there's a built-in safety in the machine that never allows it to dial more than once while that exchange is in there." (Tr. at 19-20.)

Early ADAD models could take up to 32 seconds to disconnect the line when a called party hung up the telephone, because they did so only after receiving a signal from the telephone company, but newer models disconnect immediately when the called party hangs up. (*Id.* at 29; Affidavit of Carl R. Kolker, February 18, 1993, ¶ 5.) Mrs. Moser uses the newer models. (Tr. at 20.)

The advertising message transmitted by Mrs. Moser's ADADs lasts 15 seconds (if the called party does not hang up), and it is followed by 15 seconds of blank tape for the called party to record a message. The total amount of time that Mrs. Moser's machines engage a telephone is thus 30 seconds, "and that's if the [called party] keeps it going themselves. *** Any time they hang up, it's terminated," and the computer releases the connection. (*Id.* at 21.)

Plaintiff National Association of Telecomputer Operators is an association of about 40 small business persons who use ADADs like Mrs. Moser's in their businesses. The members include a piano tuner, several carpet cleaners, insurance agents, and "a paraplegic Vietnam vet in Washington, D.C., that uses this exclusively for his business." (*Id.* at 21-22.)

Fewer than 10,000 ADADS are in operation today. (Kolker Affidavit, February 18, 1993, ¶ 2.) Most of them are used by small businesses like those of the petitioners.

C. Trial Court Proceedings

After an evidentiary hearing, the district court entered a preliminary injunction enjoining respondents from enforcing the prohibition on the use of ADADs to transmit commercial messages. (A-34 to A-46.)[1] Thereafter, the parties filed cross-motions for summary judgment. The district court granted petitioners' motion and denied respondents' motion, holding that the TCPA's restriction on commercial speech violates the First Amendment under the test set out in *Central Hudson Gas & Elec. Corp. v. Public Service Com'n*, 447 U.S. 557 (1980). (A-13 to A-33.) It entered a judgment permanently enjoining respondents from enforcing the TCPA's ban on the use of ADADs to transmit commercial messages.

D. The Decision on Appeal

The Court of Appeals reversed. (A-1 to A-12.)[2] Although the district court held that the distinction between commercial and noncommercial speech created by the TCPA

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[1] The district court had jurisdiction to hear the case under 28 U.S.C. § 1331.

[2] The jurisdiction of the Court of Appeals was invoked under 28 U.S.C. § 1291.

with respect to the use of ADADs was subject to the test for restrictions on commercial speech set out in *Central Hudson*, the Court of Appeals declined to apply that test. It reasoned as follows:

> "The statute does not distinguish between commercial and noncommercial calls, except as it makes reference to calls not made for a commercial purpose that the FCC is granted permission to exempt by regulation under conditions it may prescribe. This language is permissive, not mandatory. It in no way requires the FCC to adopt such exemptions by regulation, order or otherwise." (A-6 to A-7.)

The Court of Appeals therefore "conclude[d] that the statute should be analyzed as a content-neutral time, place, and manner restriction." (A-8.)

It is not clear why the Court of Appeals thought the "permissive" nature of Congress's directive to the FCC with respect to favored treatment for noncommercial speech should exempt the Act from the test set out in *Central Hudson*. The fact is that pursuant to the authority given it in the TCPA, the FCC *did* promulgate regulations that allow nonprofit and charitable speakers to use ADADs to call residential phone lines and play prerecorded messages. The FCC could *not* have made a distinction between commercial and noncommercial speech had it not been authorized to do so by the statute. The distinction was created by Congress, in the TCPA itself; the FCC merely put regulatory flesh on the statutory bones. Petitioners' First Amendment and equal

protection challenges were therefore properly brought against the statute itself, and the questions of law raised by those challenges are properly presented to this Court by this petition.

REASONS FOR GRANTING THE PETITION

I. By prohibiting the use of ADADs for commercial speech while authorizing the FCC to allow the use of ADADs for noncommercial speech, the TCPA violates the First Amendment and the equal protection component of the Fifth Amendment. In upholding the statutory scheme, the Court of Appeals departed from this Court's recent decisions that recognize the value of commercial speech and its entitlement to substantial First Amendment protection.

A. There Is No Reasonable Fit Between the Government's Interest in Protecting Residential Privacy and Its Decision to Ban the Use of ADADs for Commercial Advertising Messages But Not for Noncommercial Messages.

The sections of the TCPA challenged in this case impose restrictions on commercial speech. The effect of 47 U.S.C. § 227(b)(1)(B), read in conjunction with 47 U.S.C. § 227(b)(2)(B)(i) and the FCC regulations promulgated thereunder, is to prohibit only one very narrow class of activity: the use of a prerecorded voice to initiate a telephone call transmitting an advertising message to a private residence by a profit-making person or entity. The TCPA thus allows all speakers (those with profit-making motives and those with nonprofit motives alike) to use ADADs to convey messages that do not contain advertisements, but it prohibits profit-making persons from using ADADs to transmit advertisements for their goods and services.

The governmental interest identified by Congress in support of this restriction on the use of ADADs was the protection of residential privacy.[3] Despite the fact that unsolicited telephone calls bearing noncommercial solicitations (for a charitable or political cause, for example) are no less an intrusion into residential privacy than telephone calls bearing commercial solicitations, Congress authorized the FCC to allow the use of ADADs for the former, while prohibiting their use for the latter.

This discrimination against commercial speech violates the First Amendment. Under *Central Hudson*, a restriction on commercial speech may be upheld only if "it is not more extensive than is necessary to serve [a substantial governmental] interest." 447 U.S. at 566. "It [is the government's] burden to establish a 'reasonable fit' between its legitimate interests *** and *** the means chosen to serve those interests." *City of Cincinnati v. Discovery Network*, ___ U.S. ___, 113 S. Ct. 1505, 1510, 123 L. Ed. 2d 99 (1993). "[S]ince [the government] bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require." *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

Respondents failed to sustain that burden, because they did not establish that there is a reasonable fit between Congress's stated goal of protecting residential privacy, and the means it chose to accomplish that goal: namely, a

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[3] *See* the statement of congressional "Findings" to that effect, set out in Section 2 of the TCPA (A-47 to A-49, *infra*), especially subparagraphs (5), (9), (12), and (13).

prohibition on the use of ADADs for commercial speech, but not for noncommercial speech. Indeed, the district court determined that there was no fit at all; it rejected respondents'

> "*** bald assertion that banning commercial solicitations but not nonprofit solicitations furthers the protection of residential tranquility. Both kinds of telemarketing calls trigger the same ring of the telephone; both kinds of calls invade the home equally, and both risk interrupting the recipient's privacy equally." (A-28.)

That conclusion was clearly correct. The TCPA authorized the FCC to permit a charitable group like the Association of Retarded Citizens to use an ADAD to solicit the purchase of light bulbs, but it prohibits Kathy Moser from using her ADAD to solicit the purchase of light bulbs. Similarly, the TCPA authorized the FCC to permit Kathy Moser to use her ADAD to invite people to her church functions (and she does use it for that purpose; Preliminary Injunction Hearing Tr. at 17), presumably even if those functions included such money-raising activities as bake sales or holiday bazaars, but it prohibits her from using it to invite her neighbors to her own Tupperware party or garage sale.

Obviously, all of these telephone calls are equally intrusive, and the proposition that a ringing telephone's peremptory summons from the dinner table or the bath or the bridge game is somehow "intrusive" if the person who answers it hears a recorded message for a chimney sweep

company, but that it is not "intrusive" if the person hears a recorded message soliciting a contribution for a charity or a college or an arts organization or the governor's reelection campaign, is absurd.[4]

Moreover, the findings contained in the TCPA itself lend no support to a conclusion that consumers are bothered more by computer-generated prerecorded telephone calls from commercial speakers than by similar calls from non-commercial speakers. Thus, paragraph 10 of the Findings in Section 2 of the TCPA asserts that "[e]vidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, *regardless of the content or the initiator of the message*, to be a nuisance and an invasion of privacy," while paragraph 13 states that "the evidence presented to Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, *regardless of the type of call* ***." TCPA, Section 2, ¶¶ 10, 13 (emphasis added). (A-48, A-49.) Despite that evidence, Congress decided that the FCC "should have the flexibility" to exempt noncommercial calls from its prohibition on the use of ADADs. *Id.*, ¶ 13.

The *only* explanation for the distinction between commercial and noncommercial speech in the TCPA thus lies in the low value Congress apparently placed on com-

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[4] As the district court put it, "all telemarketing calls, regardless of whether they are introduced by operators, or on behalf of a charity, or deliver a prerecorded message, threaten the privacy that Congress is striving to protect. *** Congress is attempting to ban totally a form of commercial speech, for the sake of reducing only slightly the number of telephone solicitations." (A-31, A-32.)

mercial speech. As *Discovery Network* shows, however, government may not justify a distinction between commercial and noncommercial speech simply by asserting that the former has a lower value than the latter. In *Discovery Network*, this Court said that it was "unwilling to recognize Cincinnati's bare assertion that the 'low value' of commercial speech is a sufficient justification for its selective and categorical ban on [one type of] newsracks ***." 113 S. Ct. at 1516. Cincinnati's ordinance therefore violated the First Amendment, for "[n]ot only does Cincinnati's categorical ban on commercial newsracks place too much importance on the distinction between commercial and noncommercial speech, but in this case, the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted." *Id.* at 1514 (emphasis in original). The city's argument to the contrary, the Court said, was based on "the fallacy" that commercial publications were somehow greater contributors to visual blight than were noncommercial publications. *Id.* at 1515.

The same conclusion is appropriate here. The TCPA, too, places "too much importance on the distinction between commercial and noncommercial speech," and here, too, "the distinction bears no relationship" to the government's interest, for the distinction made by the TCPA between commercial and noncommercial uses of ADADs bears no relationship to the statute's purported goal of protecting residential privacy. The peremptory ring of a telephone is no more and no less intrusive, and no more and no less disruptive of whatever activity may be occurring in the home, if it is Kathy Moser's ADAD asking whether someone would like to have a chimney cleaned, or if it is Kathy

Moser's ADAD soliciting someone to come to her church's car wash or rummage sale, or soliciting someone to buy Girl Scout cookies.

The Court in *Discovery Network* also noted that "if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." 113 S. Ct. at 1510 n.13.[5] There is no doubt that Congress could have addressed its concern for residential privacy by adopting "alternatives" that are "less-burdensome" than prohibition of ADADs. For example, Congress could have restricted the use of ADADs to certain hours or to certain days, or it could have limited the frequency of their use, by limiting the number of calls each ADAD can make or by limiting the number of times it can call any particular residential number

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[5] *Accord Rubin v. Coors Brewing Co.*, ___ U.S. ___, 63 U.S.L.W. 4319, 4323-24 (1995) ("the availability of [other regulatory alternatives], all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that [the challenged restriction on commercial speech] is more extensive than necessary").

in a given period.[6] The availability of these "less-burdensome alternatives" to achieve Congress's goal shows that "the 'fit' between ends and means" in the TCPA is not reasonable.

Finally, the Court in *Discovery Network* also rejected the city's argument that the "justification" for its ordinance could salvage an otherwise improper time, place and manner regulation:

> "*** We agree with the city that its desire to limit the total number of newsracks is 'justified' by its interest in safety and esthetics. The city has not, however, limited the number of newsracks; it has limited (to zero) the number of newsracks *distributing commercial publications*. As we have explained, there is no justification for that particular regulation other than the city's naked assertion that commercial speech has 'low value.' It is the absence of a neutral justification for its selective ban on newsracks that prevents the city from defending its newsrack policy as content-

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[6] Respondents asserted in the court below that "Congress found *** that prerecorded messages frequently tie up telephone lines and leave extended, unwanted messages on answering machines." (Brief for the Appellants, No. 93-35686 (9th Cir.) at 24.) However, the evidence in the record here was undisputed that newer ADAD models do not cause those problems (Kolker Affidavit, February 18, 1993, ¶¶ 2-5), and a "narrowly tailored" regulation would obviously be one that prohibited the use of the kind of ADADs that cause the problem, not the kind that do not.

neutral." 113 S. Ct. at 1517 (emphasis in original).

That analysis is equally applicable here. Even if Congress's desire to limit telephone calls could be justified by an interest in protecting residential privacy, Congress has not limited the number of unsolicited and intrusive telephone calls; indeed, it has not even limited the number of unsolicited *commercial* telephone calls. All it has done is to limit (to zero) the number of commercial telephone calls made for advertising purposes by ADADs. Nonprofit organizations and politicians can continue to use ADADs to make unsolicited calls, and even the vast majority of commercial calls (those made by live operators, those made by predictive dialers (that is, computers that dial numbers and switch to a live operator when the call is answered), and those made by ADADs operated by charitable and political groups) are untouched by the TCPA, and can continue to proliferate, unrestrained. There is no "neutral justification" for the "selective ban" on the use of ADADs by one narrow class of users.

B. The TCPA's Ban on the Use of ADADs for Commercial Advertising Violates Petitioners' Equal Protection Rights Under the Fifth Amendment.

The district court did not reach petitioners' equal protection claim, having sustained their challenge on First Amendment grounds. Petitioners preserved that claim in the Court of Appeals, as an alternate ground for affirming the judgment, but although the Court of Appeals acknowledged that petitioners had made such a claim, *see infra*, A-6, that court reversed the judgment without addressing it.

"The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives," *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 101 (1972),[7] and this Court has at least twice applied that principle to invalidate restrictions on expression. In *Mosley* itself, the Court struck down a statute that prohibited pickets and demonstrations within 150 feet of a school during school hours, but exempted "peaceful picketing" of any school involved in a labor dispute. The Court found that the city's goal, "preventing school disruption," was "legitimate," *Id.* at 99-100, but that the city's means to achieve that goal was not narrowly tailored, since it prohibited one kind of picketing while allowing another kind of picketing that had just as much potential for disruption. "Far from being tailored to a substantial governmental

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[7] "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

interest, the discrimination among pickets is based on the content of their expression. Therefore, under the Equal Protection Clause, it may not stand." 408 U.S. at 102 (footnote omitted).

The Court followed and applied the *Mosley* analysis in *Carey v. Brown*, 447 U.S. 455 (1980). The statute at issue in *Carey* prohibited the picketing of residences, but exempted peaceful picketing of any residence that was also a place of employment involved in a labor dispute. The government argued that it could ban the nonlabor-related picketing "under the guise of preserving residential privacy." *Id.* at 462. The Court rejected that argument:

> "*** [T]he exclusion for labor picketing cannot be upheld as a means of protecting residential privacy for the simple reason that nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy. Appellant can point to nothing inherent in the nature of peaceful labor picketing that would make it any less disruptive of residential privacy than peaceful picketing on issues of broader social concerns. Standing alone, then, the State's asserted interest in promoting the privacy of the home is not sufficient to save the statute." *Id.* at 465.

The Court concluded that the statute violated the Equal Protection Clause because it "discriminate[d] among pickets based on the subject matter of their expression." *Id.* at 471.

That analysis is fully applicable here. Just as the governments in *Mosley* and in *Carey* could not identify anything inherently more disruptive in one type of picketing than in another, respondents here can point to nothing that renders prerecorded commercial messages inherently more intrusive than other types of telemarketing messages delivered to the home over the telephone lines. A prerecorded message advertising a car wash to benefit a school soccer team is no less intrusive than a prerecorded message advertising a commercial car wash. Nothing in the distinction between these two kinds of messages "has any bearing whatsoever on privacy." By banning the use of ADADs for commercial purposes, while authorizing the FCC to permit the use of ADADs for noncommercial purposes, the TCPA therefore violates the equal protection component of the Fifth Amendment.

II. Restrictions on the use of ADADs for commercial speech have become widespread and are the subject of conflicting lower court decisions. This Court should grant a writ of certiorari to address the important question presented.

Congress and at least 42 state legislatures have enacted laws that either ban ADADs altogether or substantially restrict their use, particularly for commercial purposes. Lower court judges have reached conflicting conclusions as to the constitutionality of these restrictions. In addition to the district court in this case, two other courts have sustained constitutional challenges to telemarketing statutes that make the kind of commercial/noncommercial

distinction that is at issue here. *Lysaght v. State of New Jersey*, 837 F. Supp. 646 (D. N.J. 1993) (preliminary injunction issued against New Jersey statute on First Amendment grounds; converted to permanent injunction by Consent Order entered April 20, 1995); *Moser v. Frohnmayer*, 315 Or. 372, 845 P.2d 1284 (1993) (Oregon statute invalidated on state constitutional free expression grounds). In addition to the Court of Appeals in this case, one other court has rejected the constitutional challenge. *State v. Casino Marketing Group, Inc.*, 491 N.W.2d 882 (Minn. 1992), *cert. denied sub nom Hall. v. Minnesota*, 113 S. Ct. 1648 (1993).

Taken together, the state and federal restrictions are "virtually sounding the death knell for all commercial uses of automatic dialers across the country." Note, *What About the Lucky Leprechaun?: An Argument Against "The Telephone Consumer Protection Act of 1991,"* 1991 Colum. Bus. L. Rev. 417, 420. The facts of this case, however, show that many small business owners depend heavily on the use of ADADs for the success of their business operations, and the TCPA's prohibition on the use of these machines to transmit advertising messages represents a serious threat to the free speech interests of these entrepreneurs.

By prohibiting the use of ADADs in the name of protecting residential privacy, and then authorizing the FCC to allow their use for all kinds of noncommercial messages that are equally intrusive into residential privacy, Congress--like the City of Cincinnati, in enacting its newsrack ordinance--has "seriously underestimate[d] the value of commercial speech." *Discovery Network*, 113 S. Ct. at 1511. And by rejecting petitioners' challenge to the con-

stitutionality of the discrimination against commercial speech contained in the TCPA, the Court of Appeals gave short shrift to the

> "societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard. *** The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, *not the government*, assess the value of the information presented." *Edenfield v. Fane*, ___ U.S. ___, 113 S. Ct. 1792, 1798, 123 L. Ed. 2d 543 (1993) (emphasis added).

Kathy Moser's experience shows that when given the opportunity, many consumers *do* respond favorably to advertising messages transmitted by ADADs. Now, however, Kathy Moser can no longer use her ADAD to communicate truthful and useful advertising messages. The drastic impact that the TCPA will have on the livelihood of small business persons like Mrs. Moser, the statute's unwarranted hostility toward commercial speech, and the conflicting lower court decisions concerning the constitutionality of the kind of restrictions authorized by the TCPA, are all factors justifying this Court's review of the Ninth Circuit decision in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 5, 1995

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHRYN MOSER; NATIONAL ASSOCIATION OF TELECOMPUTER OPERATORS,	)	No. CA 93-35686
	)	D.C. No. CV-92-01408-JAR
Plaintiffs-Appellees,	)	
	)	OPINION
v.	)	
FEDERAL COMMUNICATIONS COMMISSION, a federal agency; JAMES H. QUELLO, in his capacity as interim Chairman of the Federal Communications Commission,	)	
Defendants-Appellants.	)	

Appeal from the United States District Court
for the District of Oregon
James A. Redden, District Judge, Presiding

Argued and Submitted
October 31, 1994 -- Portland, Oregon

Filed February 6, 1995

Before: Betty B. Fletcher, Dorothy W. Nelson, and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Fletcher

COUNSEL

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Charles F. Hinkle, Stoel Rives Boley Jones & Grey, Portland, Oregon, for the plaintiffs-appellees.

OPINION

FLETCHER, Circuit Judge:

The Federal Communications Commission ("FCC") appeals the district court's ruling on summary judgment that a provision of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, banning prerecorded telemarketing calls violates the First Amendment. The FCC argues as a threshold matter that the district court lacked jurisdiction and, on the merits, that the district court erred in finding that the statute did not constitute a "reasonable fit" with the government's legitimate interest in protecting residential privacy. We hold that the district court had jurisdiction. We reverse on the merits.

I

Congress held extensive hearings on telemarketing in 1991. Based upon these hearings, it concluded that telemarketing calls to homes constituted an unwarranted intrusion upon privacy. The volume of such calls increased substantially with the advent of automated devices that dial up to 1,000 phone numbers an hour and play prerecorded sales pitches. S. Rep. No. 102-178, 102d Cong., 1st Sess. (1991), *reprinted in* 1991 U.S.C.C.A.N. at 1970. By the fall of 1991, more than 180,000 solicitors were using automated machines to telephone 7 million people each day. *Id.*

In addition to the sheer volume of automated calls, Congress determined that such calls were "more of a nuisance and a greater invasion of privacy than calls placed by 'live' persons" because such calls "cannot interact with the customer except in preprogrammed ways" and "do not allow the caller to feel the frustration of the called party ...." *Id.* at 1972. Customers who wanted to remove their names from calling lists were forced to wait until the end of taped messages to hear the callers' identifying information. Prerecorded messages cluttered answering machines, and automated devices did not disconnect immediately after a hang up. *Id.* at 1972.[1] In a survey conducted for a phone company, 75 percent of respondents favored regulation of automated calls, and half that number favored a ban on all

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[1] Appellants contend that newer automated machines disconnect when they reach an answering machine, and terminate the call within one second of a hang up.

phone solicitation. *Id.* at 1970. Although 41 states and the District of Columbia have restricted or banned intrastate automated commercial calls,[2] many states asked for federal legislation because states may not regulate interstate calls. *Id.*

The Telephone Consumer Protection Act, Pub. L. No. 102-243, 105 Stat. 2394-2402 (1991), an amendment to the Communications Act of 1934, was passed on December 20, 1991, to take effect a year later. It provides in part:

> It shall be unlawful for any person with the United States
>
> ...(B) to initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B)....

47 U.S.C. § 227(b)(1).

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[2] Three state statutes have faced constitutional challenges. The Minnesota statute was upheld in *Humphrey v. Casino Marketing Group, Inc.*, 491 N.W.2d 882 (Minn. 1992), *cert. denied*, 113 S. Ct. 1648 (1993). The New Jersey statute was found unconstitutional in *Lysaght v. New Jersey*, 837 F. Supp. 646 (D.N.J. 1993), and the Oregon statute was found to violate the Oregon constitution in *Moser v. Frohnmayer*, 845 P.2d 1284 (Or. 1993).

Under the statute, prerecorded messages may be used only if a live operator introduces the message or if the consumer consents. All live solicitation calls, as well as automated calls to most business, are permitted. The statute authorizes the FCC to enact limited exemptions from the ban, including an exemption for calls not made "for a commercial purpose."[3] The FCC adopted regulations on September 17, 1992, that exempted calls by tax-exempt, nonprofit organizations. 47 C.F.R. § 64.1200(c)(4).

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[3] Section 227(b) reads:

...(2) REGULATIONS; EXEMPTIONS AND OTHER PROVISIONS.-- The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission--

...(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe--

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines--

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement.

II

The nonprofit National Association of Telecomputer Operators ("NATO") and its president, Kathryn Moser, filed suit on November 12, 1992, seeking injunctive relief and a declaratory judgment. NATO alleged that the law created a content-based restriction not narrowly tailored to further a substantial government interest, in violation of the First Amendment. It also claimed that the statute violated the Equal Protection Clause of the Fifth Amendment.

The district court granted a preliminary injunction on December 18, 1992. *Moser v. FCC*, 826 F. Supp. 360, 361 (D.Or. 1993). On May 21, 1993, the court granted summary judgment for the plaintiffs, declaring that the statute violated the First Amendment. The court did not reach the Fifth Amendment claim. *Id.* at 367.

III

First we address the FCC's challenge to the district court's jurisdiction. The FCC claims that the lawsuit should have originated in the court of appeals, which has exclusive jurisdiction over challenges to FCC regulations. 28 U.S.C. § 2341, 47 U.S.C. § 402(a); *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984). The FCC contends that NATO's challenge necessarily is to the regulations, as the statute does not distinguish between commercial and noncommercial calls.

[1] The statute does not distinguish between commercial and noncommercial calls, except as it makes

reference to calls not made for a commercial purpose that the FCC is granted permission to exempt by regulation under conditions it may prescribe. This language is permissive, not mandatory. It in no way requires the FCC to adopt such exemptions by regulation, order or otherwise. Appellees insist they expressly challenge the statute and only the statute. The district court has jurisdiction over a challenge to the statute's constitutionality. We note that it is a narrow challenge. It does not reach the regulations which are outside the jurisdiction of the district court. We understand appellees challenge them in a separate proceeding initiated in this court as a petition for review of Commission action. Therefore, we do not review here the FCC's regulation that exempts noncommercial automated calls from its ban.

IV

We review the constitutionality of a statute de novo. *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1567 (9th Cir. 1993).

Because the district court held that the statute itself distinguished between commercial and noncommercial calls, it analyzed the statute's constitutionality under the test for regulation of commercial speech articulated in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 564, (1980) and *Board of Trustees v. Fox*, 492 U.S. 469, 480, (1989). *Moser v. FCC*, 826 F. Supp. at 363.

[2] Because nothing in the statute requires the Commission to distinguish between commercial and noncommer-

cial speech, we conclude that the statute should be analyzed as a content-neutral time, place, and manner restriction. It regulates all automated telemarketing calls without regard to whether they are commercial or noncommercial. However, we note that the tests for time, place and manner restrictions for content-neutral speech and regulations for commercial speech regulations are essentially identical. *Fox*, 492 U.S. at 477. The government may impose reasonable restrictions on the time, place, or manner of protected speech, provided that the restrictions "are justified without reference to the content of the restricted speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

NATO does not challenge the government's significant interest in residential privacy, and does not dispute that curbs on telemarketing advance that interest. Rather, it asserts that a selective ban on automated, commercial calls is unjustified because there is no evidence that such calls are more intrusive than either "live" or noncommercial calls. The district court reasoned that, because prerecorded calls constitute a fraction of all telemarketing calls,[4] a selective ban on these calls would not advance the governmental interest in protecting privacy. *Moser v. FCC*, 826 F. Supp. at 366. The court relief heavily upon *City of Cincinnati v.*

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[4] The district court adopted NATO's estimate that only 3 percent of all solicitation calls are taped. However, the FCC contends that 17-30 percent of telemarketing calls are automated.

Discovery Network, 113 S. Ct. 1505 (1993), in which the Supreme Court rejected a selective ban on commercial newsracks on the ground that such newsracks posed no greater threat to safety and aesthetics than noncommercial newsracks.

[3] Because the statute does not require that the FCC distinguish between commercial and noncommercial calls, the appropriate inquiry is whether a ban on automated telemarketing calls is narrowly tailored to the residential privacy interest, and whether ample alternative channels of communication remain open.

[4] There was significant evidence before Congress of consumer concerns about telephone solicitation in general and about automated calls in particular. Congress made extensive findings. *See supra* at 1506-7. The district court did not give sufficient weight to these findings. "When Congress makes findings on essentially factual issues...those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n. 12, 105 S. Ct. 3180, 87 L.Ed.2d 220 (1985). Such deference does not foreclose the court's independent judgment of the facts bearing on an issue of constitutional law. *Sable Communications v. FCC*, 492 U.S. 115, 129, 109 S. Ct. 2829, 106 L.Ed.2d 93 (1989).

[5] We conclude that Congress accurately identified automated telemarketing calls as a threat to privacy. Further, Congress could regulate a portion of these calls without

banning all of them. The Supreme Court has repeatedly stated that "underinclusiveness" may be the basis of a First Amendment violation only when a regulation represents to "attempt to give one side of a debatable public question an advantage in expressing its views to the people." *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2043 (1994) (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978)). The ban on automated, prerecorded calls is not an attempt to favor a particular viewpoint.

In *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 1706-08 (1993), the Supreme Court upheld a ban on the broadcast of lottery advertisements by radio stations licensed in states without lotteries, despite evidence that listeners along state borders would be bombarded by ads broadcast by stations in states with lotteries. The Court said, "Nor do we require that the Government make progress on every front before it can make progress on any front...[T]he Government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated." *Id.* at 2707; *see also R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2545 (1992) (holding that "the First Amendment imposes not an 'underinclusiveness' limitation but a 'content discrimination' limitation"); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981) (upholding distinction between on-site and off-site on billboards); *Curtis v. Thompson*, 840 F.2d 1291, 1303 (7th Cir. 1988) (stating that claim that statute regulating real estate solicitations is underinclusive "asks us to second-guess the Illinois General Assembly and hold the statute unconstitutional...because we may believe that Illinois could have prohibited more expressive contact").

Such is the case here. Congress may reduce the volume of intrusive telemarketing calls without completely eliminating the calls.

The district court also found that Congress had failed to consider adequately less restrictive alternatives. *Moser v. FCC*, 826 F. Supp. at 367. This conclusion is at odds with the court's finding that Congress considered and rejected less restrictive forms of regulation, including a bill that would have required solicitors to give their names, addresses, and phone numbers in their messages and to use machines with certain disconnect features. *Id.* at 365.

[6] The restrictions in the Act leave open many alternative channels of communication, including the use of taped messages introduced by live speakers or taped messages to which consumers have consented, as well as all live solicitation calls. That some companies prefer the cost and efficiency of automated telemarketing does not prevent Congress from restricting the practice. *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949) ("That more people may be more easily and cheaply reached...is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open.").

CONCLUSION

The provision in the Telephone Consumer Protection Act of 1991 banning automated, prerecorded calls to residences is content-neutral. Congress adequately demonstrated

that such calls pose a threat to residential privacy. The ban is narrowly tailored to advance that interest, and leaves open ample alternative channels of communication. Thus, it does not violate the First Amendment.

REVERSED.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KATHRYN MOSER and NATIONAL ASSOCIATION OF TELECOMPUTER OPERATORS,	)	Civil No. 92-1408-RE
Plaintiffs,	)	OPINION
v.	)	
FEDERAL COMMUNICATIONS COMMISSION, a federal agency, and JAMES H. QUELLO, in his capacity as Chairman of the Federal Communications Commission,	)	
Defendants.	)	

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REDDEN, Judge:

In December, 1992, this court granted plaintiffs' motion for a preliminary injunction enjoining defendants from enforcing 47 U.S.C. § 227(b)(1)(B), which prohibits using an artificial or prerecorded voice to deliver some commercial messages to residential telephone lines without the consent of the called party. During the ensuing months, both parties

have moved for dispositive rulings and submitted supporting memoranda.

Oral argument was heard on 16 March 1993, and the parties have since filed supplemental briefing on two recent Supreme Court decisions relevant to the issues presented here. Final briefing was received from the parties on 12 May 1993. For the reasons that follow, plaintiffs' motion for summary judgment is granted.

BACKGROUND

In 1991, Congress enacted the Telephone Consumer Protection Act ("TCPA"), which amended the Communications Act of 1934 by restricting telephone solicitation techniques. The amendment provides in part:

> (b) RESTRICTIONS ON THE USE OF AUTOMATED TELEPHONE EQUIPMENT
>
> (1) PROHIBITIONS - It shall be unlawful for any person within the United States -
>
> * * *
>
> (B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the [Federal Communications] Commission under Paragraph (2) (B);

* * *

(2) REGULATIONS; EXEMPTIONS AND OTHER PROVISIONS - The Commission shall Prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this the Commission -

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or Prerecorded voice to which they have not given their prior express consent; and

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe -

(i) calls that are not made for a commercial purpose;

and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines -

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement.

47 U.S.C. § 227(b).

The Federal Communications Commission (FCC) promulgated regulations under the TCPA which were to have become effective 20 December 1992. This court issued a preliminary injunction because serious questions were raised regarding whether there was a reasonable fit between the TCPA and the desired objective of enhancing residential privacy.

That ruling was influenced substantially by *Discovery Network, Inc. v. Cincinnati*, 946 F.2d 464 (6th Cir. 1991). The Sixth Circuit held that invocation of an ordinance resulting in a ban of commercial handbill distribution on public property placed a substantially greater burden on commercial speech than was necessary to alleviate aesthetic and safety concerns related to the proliferation of newsracks on city streets.

On 24 March 1993, the Supreme Court affirmed the Sixth Circuit's decision. *Cincinnati v. Discovery Network*, ___ U.S. ___, 113 S. Ct. 1505 (1993). The Court concluded that the city failed to establish that a reasonable fit existed between the restrictions being placed upon commercial speech through the ban on commercial handbill newsracks, and the goals of safety and aesthetics the city sought to serve by invoking such a ban.

ANALYSIS

The two conclusions drawn after the 17 December 1992 preliminary injunction hearing remain valid: the TCPA affects commercial speech and must therefore pass muster under the constitutional standards protecting commercial speech, and the government's interest in promoting residential privacy, which prompted the TCPA, is substantial.

A. Jurisdiction

At the outset, this court must address the government's assertion that the exercise of jurisdiction must distinguish the TCPA as a statute from the FCC's related regulations. The government contends that the statute--on its face--bans all unsolicited, prerecorded calls not initiated for emergency purposes, regardless of the message's content. Congress authorized the FCC to implement the requirements of the statute, and allowed the FCC to establish exemptions to this ban, under 47 U.S.C. § 227(b)(2)(B). That section states that the FCC may exempt calls that are not made for a commercial purpose.

The circuit courts of appeals have exclusive jurisdiction to review FCC regulations. 28 U.S.C. § 2341; 47 U.S.C. § 402(a); *FCC v. ITT World Communications, Inc.*, 466 U.S. 463 (1984). Here, however, the statute itself establishes a distinction between commercial and noncommercial speech in the implementing instructions it provides to the FCC. The report submitted by the House Committee on Energy and Commerce, in which the Committee discussed its findings related to the proposed exclusion of calls from

tax exempt organizations in an earlier version of the bill, states:

> In crafting [the statute], the Committee was sensitive to restraints on its authority to regulate the speech of charitable and political organizations, speech which the Supreme Court has identified as "core" First Amendment Speech. . . . [T]he Committee found that solicitations by such organizations were less of a problem than commercial calls. It is on this basis that the Committee believes that the scope of the regulation is a workable "commercial speech" distinction consistent with Supreme Court precedent.

H. Rep. No. 102-317, 102d Cong., 1st Sess., 17 (1991) (citations omitted) (referred hereinafter as "House Report"). This court has jurisdiction--and properly undertakes this examination--regarding the attempt by Congress to distinguish and permit restriction of commercial speech in passage of the TCPA.

B. Is the TCPA Content-Neutral?

Plaintiffs argue that the statute restricts speech impermissibly on the basis of its content or the speaker's viewpoint, since telemarketing computers with prerecorded messages are prohibited for commercial uses, but not for political activities, polling, or solicitations from nonprofit organizations. Plaintiffs refer to *R. A. v. v. St. Paul*, ___ U.S. ___, 112 S. Ct. 2538, 2542 (1992) for the proposition

that the Supreme Court prohibits regulations of speech based upon the content or viewpoint of that speech.

Defendants contend the TCPA's restrictions are not content-based, reiterating that on its face, the statute bans all automated calls and leaves the implementation of exemptions to the FCC. As reviewed above, however, the statute does distinguish among forms of speech, and these distinctions are undeniably based upon the content of the speech.

As *Discovery Network* states, "government may impose reasonable restrictions on the time, place or manner of engaging in protected speech provided that they are adequately justified 'without reference to the content of the regulated speech."' *Discovery Network*, 113 S. Ct. at 1516, (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (other citation omitted)).

In *Ward*, the Supreme Court stated:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984). The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an

> incidental effect on some speakers or messages but not others.

Ward, 491 U.S. at 791.

More recently, the Court rejected the argument that discriminatory treatment "is suspect under the First Amendment only when the legislature intends to suppress certain ideas." *Simon & Schuster v. Members of New York State Crime Victims Bd.*, ___ U. S. ___, 112 S. Ct. 501, 503 (1991).

This court concludes that the TCPA is a content-based regulation, and cannot be justified as a legitimate time, place or manner restriction on protected speech. The statute draws distinctions between the manner in which some speech is delivered (recorded versus live), but also distinguishes between messages on the basis of content (commercial versus noncommercial). Moreover, the government's purpose behind legislating the TCPA's speech restrictions is necessarily related to the content of the prerecorded messages; the statute restricts some speakers because the content of their messages (prerecorded commercial solicitations) is believed to be more invasive of residential privacy than the prerecorded speech of others (noncommercial solicitors).

Plaintiffs' assertion that the TCPA discriminates on the basis of viewpoint, however, is rejected. The *R. A. v.* decision establishes that while some categories of speech (including commercial speech) can be regulated more freely because of their content, the government cannot discriminate in favor or against a certain view. There must be "no

realistic possibility that official suppression of ideas is afoot." *R. A. v.*, 112 S. Ct. at 2547.

Here, there is no possibility of such suppression. Congress has not discriminated because it favors the viewpoints or messages of "live" telemarketing. The distinction between prerecorded and "live" messages, despite being unavoidably content-based, still targets the manner in which the message is delivered, not its content.

As in *Discovery Network*, therefore, the validity of the TCPA must be determined under the law established in *Board of Trustees v. Fox*, 492 U.S. 469 (1989) and *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

These cases hold that restrictions on commercial speech must (1) implement a substantial governmental interest; (2) directly advance that interest; and (3) be narrowly tailored to achieve the desired objective. *Central Hudson* held a restriction on commercial speech passes constitutional muster if it directly advances a substantial governmental interest in a manner that is no more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 564.

C. Is the TCPA Unconstitutional Under the Applicable Tests?

The Court in Fox determined that a regulation restricting commercial speech can be more extensive than necessary, as long as a "reasonable fit" exists between the

ends promoted by the regulation and the means chosen by the regulation for that promotion. *Fox*, 492 U.S. at 480. While the governmental interest addressed by the TCPA is viewed as substantial, this court finds that a reasonable fit does not exist between the interest in privacy, and the means chosen to promote that interest.

1. Is the Governmental Interest Substantial?

As noted earlier, the government's interests in promoting residential privacy, which prompted the TCPA, are substantial. A recent Minnesota decision upholding a similar state statute provides this perspective:

> "In short, the residential telephone is uniquely intrusive. The caller, who can convey messages which very young children can understand, is able to enter the home for expressive purposes without contending with such barriers as time or distance, doors or fences. . . . Moreover, the shrill and imperious ring of the telephone demands immediate attention. Unlike the unsolicited bulk mail advertisement. . . the ring of the telephone mandates prompt response, interrupting a meal, a restful soak in the bathtub, even intruding on the intimacy of the bedroom."

State of Minnesota v. Casino Marketing Group, Inc., 491 N.W.2d. 882, 888-89 (Minn. 1992), *cert. den. Hall v. Minnesota*, 113 S. Ct. 1648 (1993).

The Supreme Court addressed this privacy issue in *Frisby v. Schultz*, 487 U.S. 474 (1988), which held an ordinance banning residential picketing was not facially invalid under the first amendment. The Court described the governmental interest in the tranquility and privacy of the home--the "last citadel of the tired, the weary, and the sick"--as being "of the highest order." *Id.* at 484 (citations omitted). This court concludes that the TCPA addresses a substantial governmental interest in protecting residential privacy.

2. Does a "Reasonable Fit" Exist Between the Ends Promoted by the Regulation and the Means Chosen by the Regulation for that Promotion?

Under *Fox*, it is the government's burden to establish that a reasonable fit exists between the legislation it seeks to enact and the burden the law would place upon constitutional rights. *Fox*, 492 U.S. at 480. The Court in *Discovery Network* concluded that Cincinnati failed to calculate carefully the costs and benefits associated with the burden it attempted to place on speech.

The Court held:

> "In the absence of some basis for distinguishing between "newspapers" and "commercial handbills" that is relevant to an interest asserted by the city, we are unwilling to recognize Cincinnati's bare assertion that the 'low value' of commercial speech is a sufficient justification for its selective and cate-

> gorical ban on newsracks dispensing 'commercial handbills.' . . . Because the distinction Cincinnati has drawn has absolutely no bearing on the interests it has asserted, we have no difficulty concluding . . . that the city has not established the 'fit' between its goals and its chosen means that is required by our opinion in *Fox*.

Discovery Network, 113 S. Ct. at 1516. The same is true here. The government has failed its burden of establishing a reasonable fit between the ends sought, and the burden the legislative means places-upon speech.

The TCPA creates two distinctions in regulating speech: one between recorded commercial speech and recorded noncommercial speech, and another between recorded commercial speech and both nonrecorded commercial speech and recorded commercial speech introduced by an operator. As explained below, these distinctions fail to directly advance Congress' legitimate privacy interests and are therefore impermissible.

a. Commercial/Noncommercial Distinction

Regarding the distinction between recorded commercial messages and recorded nonprofit messages, the committee reporting on the earlier version of the telemarketing legislation interpreted evidence before it as suggesting that nonprofit solicitations are less intrusive, and less of a threat to residential privacy, than are commercial solicitations. The government relies in large measure upon this Report,

and its references to supporting evidence, in arguing that the TCPA directly advances the privacy interests. This Report, however, concerned a telemarketing bill that excluded the use of Automated dialers to solicit individuals who have objected to receiving such calls. Rather than imposing a ban on the use of machines delivering recorded commercial messages, the bill would have required such machines to have disconnect features, and would have required the messages to contain the name, address, and telephone number of the solicitor. H.R. 1304, § 3(b)(2) and (3)(d)(2), *reprinted in* House Report at 3.

The legislation being challenged here was added later by the Senate, and is different. The TCPA bans prerecorded commercial calls altogether, rather than limiting their audience. Moreover, the Report's references to the evidence presented to the Committee suggest nothing more than telemarketing legislation was needed because of the overall increasing volume of unsolicited calls. House Report at 7.

In discussing first amendment rights involving the broadcast media, the Supreme Court has stated:

> "[I]n evaluating First Amendment claims . . . we must afford great weight to the decisions of Congress and the experience of the Commission.
>
> * * *
>
> "That is not to say we "defer" to the judgment of Congress and the Commission on

> a constitutional question, or that we would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression."

Columbia Broadcasting System, Inc. v. Democratic Nat. Committee, 412 U.S. 94, 102-03 (1973) (quotation omitted). Courts are free, of course, to make an independent factual judgment and judicial inquiries are not bound by congressional findings. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989). Much of the congressional judgment to which counsel for the government in this case seeks judicial deference regards legislation that is significantly different than the statute before this court. Furthermore, it is the FCC's interpretation of that congressional record--an interpretation permitted by the TCPA--which prompts plaintiffs' specific challenge. The circumstances in this case underscore the wisdom in the Supreme Court's recognition that "reliance on legislative history is hazardous at best." *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 242 (1990). Finally, the congressional references to supporting evidence are inconclusive on the question of whether the TCPA directly advances the interests in protecting residential privacy.

The government asserts that because a congressional report regarding similar legislation concluded that noncommercial calls are less prevalent, and "more expected," such calls are less intrusive, Congress has "justified" its differential treatment of these messages. This court disagrees.

As noted above, *Discovery Network* rejected a restriction on commercial speech based on a premise that such a restriction was justified by commercial speech's presumed low value. The Court, however, did leave open "the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial" avenues of speech. *Discovery Network*, 113 S. Ct. at 1516.

There is no such justification presented, however, in the bald assertion that banning commercial solicitations but not nonprofit solicitations furthers the protection of residential tranquility. Both kinds of telemarketing calls trigger the same ding of the telephone; both kinds of calls invade the home equally, and both risk interrupting the recipient's privacy equally. Under the TCPA, noncommercial entities may use machines to deliver prerecorded messages, which further moots the attempted distinction: both kinds of calls deprive the recipient of human interplay, both risk delivering a message to an inappropriate party, and both risk fouling the means by which telephone subscribers can record callers' messages.

This court concludes that there is no reasonable fit between the goals and the means chosen to reach those goals in the distinction Congress drew between commercial and noncommercial messages under the TCPA, and that 47 U.S.C. § 227(b)(2)(B)(i), which permits the FCC to exempt from the restrictions of TCPA those calls not made for commercial purposes, is an impermissible means of responding to Congress' legitimate interests in protecting residential privacy.

b. Recorded/Live Commercial Distinction

The challenged statute also distinguishes recorded commercial speech from nonrecorded commercial speech or recorded commercial speech introduced by an operator. Under 47 U.S.C. § 227(b)(1)(B), it would be unlawful to initiate a telephone call using "an artificial or prerecorded voice to deliver a message without the prior express consent of the called party." In discussing the constitutional concerns with banning automated messages, the Senate Report from the Commerce, Science, and Transportation Committee offered the following distinction:

> "In addition, it is clear that automated telephone calls that deliver an artificial or prerecorded voice message are more of an nuisance and a greater invasion of privacy than calls placed by 'live' persons. These automated calls cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party, fill an answering machine tape or a voice recording service, and do not disconnect the line even after the customer hangs up the telephone."

S. Rep. No. 102-178, 102d Cong., 2d Sess. (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972 (footnotes omitted).

Despite the presumed frustration of some recipients, who arguably would prefer "interacting" with an operator when responding to an invasive telemarketing call, there is little to suggest that a ban on automated calls delivering prerecorded messages directly advances the interest in residential privacy.

The House Report regarding similar telemarketing legislation also fails to provide justification for distinguishing between prerecorded commercial messages and commercial messages introduced by an operator. The Report states that every day 300,000 solicitors call 18 million Americans, not including calls made by stockbrokers. House Report at 7. The Report cites a Roper Organization survey that concluded 67 percent of the respondents found calls "from people selling things" were "very annoying," while 70 percent of the respondents objected to calls "from a computer trying to sell something." House Report at 9.

Imposing a total ban on one form of commercial speech in reliance upon a statistical distinction of three percent fails the reasonable fit test. Evidence presented to this court indicates that the solicitations being banned by the TCPA make up less than three percent of the telemarketing calls received by Americans. Second Kolker Affidavit, 18 February 1993, Para. 4. Under any interpretation of the available evidence, the TCPA's promotion of residential privacy would be by way of eliminating a very small percentage of the millions of telemarketing calls being made every day. By enacting the TCPA, the intent of Congress was to enhance residential privacy through the restriction of telemarketing calls. The Supreme Court recognized in

Discovery Network that "all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault" in contributing to the proliferation of newsracks in Cincinnati. *Discovery Network*, 113 S. Ct. at 1515. Similarly, all telemarketing calls, regardless of whether they are introduced by operators, or on behalf of a charity, or deliver a prerecorded message, threaten the privacy Congress is striving to protect. The Supreme Court recognized the disparity in not burdening newspaper racks which "are arguably the greater culprit because of their superior number." *Id.* This court recognizes the same disparity where the "greater culprit" in invasive telemarketing calls--the predictive dialing machines that place far more calls than the machines delivering recorded messages--is unrestricted.

Nor does there appear sufficient consideration of "numerous and obvious less-burdensome alternatives to the restriction on commercial speech," deemed "certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *Discovery Network*, 113 S. Ct. at 1510, n.13. The Court reasoned that Cincinnati failed to carefully calculate the costs and benefits associated with the burden it was placing on commercial speech. The logical discordance created from totally banning an avenue of commercial speech to achieve the minute benefit of eliminating only 62 out of perhaps 2,000 newsracks contributed to the conclusion that there was no reasonable fit between the governmental goal and the means chosen to pursue it. *Id.* at 1510.

There is nearly identical discord here. Congress is attempting to ban totally a form of commercial speech, for the sake of reducing only slightly the number of telephone solicitations. While regulations on commercial speech are not subjected to a "least-restrictive-means" test, neither are they reviewed under a mere rational basis standard; a court may conclude there is an absence of a reasonable fit even if a regulation need not be the least burdensome possible. *Id.* at 1510, n.13. The rulings in *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), and *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), which address the issues of underinclusiveness, do not compel a different conclusion.

Because of the slight benefit realized, and the lack of consideration of less burdensome alternatives, and the unjustified distinctions between other forms of telephonic solicitation, this court concludes that Congress has not met its burden of showing a reasonable fit between the selective, categorical ban on one form of commercial solicitation and the goal of enhancing residential privacy.

CONCLUSION

The government has not met its burden of establishing a reasonable fit between the legislation it seeks to enact and the burden the law would place upon constitutional rights, *Fox*, 492 U.S. at 480, and has failed to consider less burdensome alternatives. The TCPA places an unconstitutional

restriction upon protected commercial speech, and plaintiffs' motion for summary judgment is granted.

Dated this 21st day of May, 1993.

James A. Redden
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KATHRYN MOSER and NATIONAL ASSOCIATION OF TELECOMPUTER OPERATORS,	)	Civil No. 92-1408-AS
Plaintiffs,	)	OPINION
v.	)	
FEDERAL COMMUNICATIONS COMMISSION, a federal agency, and ALFRED C. SIKES, in his capacity as Chairman of the Federal Communications Commission,	)	
Defendants.	)	

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REDDEN, Judge:

Plaintiffs move for a preliminary injunction enjoining defendants from enforcing 47 U.S.C. § 227(b)(1)(B), a federal statute that prohibits using an artificial or prerecorded voice to deliver some commercial messages to residential telephone lines without the consent of the called party. For the reasons that follow, injunctive relief is granted.

BACKGROUND

Plaintiff Kathryn Moser operates a chimney sweeping business with her husband in Keizer, Oregon. She also is president of the National Association of Telephone Operators, the other plaintiff, which represents small businesses that use telecomputer marketing. The defendants

are the Federal Communications Commission ("FCC") and its chairman.

One year ago, Congress enacted the Telephone Consumer Protection Act of 1991 ("TCPA"), which amended the Communications Act of 1934 to restrict telephone solicitation techniques. The amendment provides in part:

> (b) RESTRICTIONS ON THE USE OF AUTOMATED TELEPHONE EQUIPMENT -
>
> (1) PROHIBITIONS - It shall be unlawful for any person within the United States -
>
> * * *
>
> (B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under Paragraph (2)(B)....

47 U.S.C. §§ 227(b)(1)(B). The FCC recently promulgated regulations for implementing these restrictions, and under the statute's terms, the restrictions and the implementing regulations were to go into effect 20 December 1992.

This court conducted a hearing on 17 December 1992 on plaintiffs' motion for injunctive relief, at which plaintiff presented evidence and testimony. Defendants raised juris-

dictional challenges, which are addressed below, and presented argument in opposition to plaintiffs' motion, but submitted no evidence or testimony.

STANDARDS

To obtain preliminary injunctive relief in the Ninth Circuit, a party must meet one of two alternative tests. Under the "traditional" test, preliminary relief may be granted if the court finds:

(1) the moving party will suffer irreparable injury if the preliminary relief is not granted;

(2) the moving party enjoys a likelihood of success on the merits;

(3) a balancing of hardships favoring the plaintiff;

(4) the advancement of the public interest favors granting injunctive relief.

Burlington N. R. Co. v. Department of Revenue, 934 F.2d 1064 (9th Cir. 1991).

Under the alternative standard, the moving party may meet its burden by showing either (1) probable success on the merits and the likelihood of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in the moving party's favor. *Associated General Contractors, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1670

(1992). These formulations "represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 174 (9th Cir. 1987). The Ninth Circuit has said that this really describes one test: "a continuum in which the required showing of harm varies inversely with the required showing of meritoriousness." *San Diego Committee Against Registration & Draft v. Governing Bd. of Grossmont Union High School Dist.*, 790 F.2d 1471, 1473 n.3 (9th Cir. 1986).

JURISDICTION

Defendants concede that jurisdiction exists here to challenge enforcement of the TCPA itself, but argue that the proper defendant is the United States, not the FCC. Additionally, the circuit courts have exclusive jurisdiction to review and stay FCC regulations. 28 U.S.C. § 2341; 47 U.S.C. § 402(a); *FCC v. ITT World Communications, Inc.*, 466 U.S. 463 (1984). To the extent plaintiff seeks to stay the enforcement of FCC's regulations, (and not the TCPA), jurisdiction rests with the Court of Appeals. *Information Providers' Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866 (9th Cir. 1991).

Plaintiffs' Amended Complaint clarifies that they assert constitutional claims against the statute, not the FCC's regulations. After hearing argument from both parties, this court is satisfied that plaintiffs are challenging the TCPA, and can properly exercise jurisdiction for declaring the statute unconstitutional.

ARGUMENT

a. Serious Questions

Where a challenged regulatory scheme restricts only commercial speech (as here), the first amendment requirements are less strict than the protections afforded other types of speech. *Washington Mercantile Asso. v. Williams*, 733 F.2d 687 (9th Cir. 1984); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-64 (1980). A restriction on commercial speech passes constitutional muster if it directly advances a substantial governmental interest in a manner that is no more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 563-64. In *Central Hudson*, the Court also stated that "[w]e review with special care regulations that entirely suppress commercial speech in order to pursue a non-speech related policy." *Id.* at 556 n.9.

More recently, the Court has said that restrictions on commercial speech should (1) implement a substantial governmental interest; (2) directly advance that interest; and (3) be narrowly tailored to achieve the desired objective. *Board of Trustees v. Fox*, 492 U.S. 469 (1989). The *Fox* Court interpreted Central Hudson's language that a regulation must not be more extensive than necessary as requiring a "reasonable fit" between the ends promoted by the regulation and the means chosen by the regulation for that promotion. *Id.* at 480.

Some of the findings by Congress under Section Two of the TCPA describe the substantial governmental interests

the statute targeted: unrestricted telemarketing "can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety;" § 2 (5); "Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices;" § 2 (9); "Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy;" § 2 (10); "Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion;" § 2 (12).

Plaintiffs concede that this concern for "protection of citizens' privacy is a legitimate governmental interest." Plaintiffs' Memorandum in Support, p.11. After receiving evidence and the parties' arguments before this court at the 17 December 1992 hearing, two conclusions appear beyond dispute: first, that the TCPA affects commercial speech and must therefore pass muster under the scrutiny of the constitutional protections given commercial speech, and second, that the government's interests prompting the TCPA are substantial.

Accordingly, the motion for injunctive relief requires the court to decide whether plaintiffs' challenges raise

serious questions regarding whether the TCPA is sufficiently narrowly tailored to achieve the desired objective of enhancing residential privacy, i.e., whether the statute effects a reasonable fit between the extent to which it achieves its objective and the burden it places on commercial speech. In *Discovery Network, Inc. v. Cincinnati*, 946 F.2d 464 (6th Cir. 1991), *cert. granted*, 112 S.Ct. 1290 (1992), the Sixth Circuit held a city ordinance unconstitutional under the first amendment for failure to effect such a reasonable fit. The ordinance's ban of commercial handbill distribution on public property placed a substantially greater burden on commercial speech than was necessary to further the city's stated goals of alleviating aesthetic and safety concerns related the proliferation of newsracks on city streets.

Though commercial speech sometimes receives lessened protection, it does not follow that commercial speech has a low value in first amendment jurisprudence. The court in *Discovery Network* identified only two types of cases in which commercial speech received less protection: regulations against commercial speech believed to be false or misleading, and regulations against speech because of perceived adverse effects its content has on the community. *Id.* at 471. The ordinance challenged in *Discovery Network* did not regulate content, nor alleviate a harm caused by the content, of commercial speech. Rather, it burdened commercial speech because of the manner of delivering that speech. The court concluded there was no reasonable fit between the heavy burden placed on plaintiffs (complete deprivation of access to city streets) and the benefit gained by the lawmakers ("paltry gains in safety and beauty"). *Id.* The court emphasized that the city's goals could be achieved

by several means other than by prohibiting all newsracks that dispensed commercial speech. To alleviate the safety risk associated with the chains used to anchor the racks, for example, a regulation could require that the racks be bolted to the sidewalks. To remedy the problems associated with racks overcrowding the sidewalks, or being unsightly, regulations could mandate the size, color or number of racks allowed. Each of these options could achieve the legislators' desired result without burdening commercial speech as heavily as the challenged ordinance.

This same reasoning appears applicable here. The TCPA does not restrict commercial speech because of its content or because of the content's effect on the community. Rather, the statute appears to burden one form of commercial speech (prerecorded messages) because of harms caused by the manner of their delivery. Serious questions are raised concerning whether there is a reasonable fit between the asserted purpose of the TCPA--enhanced residential privacy--and the means employed: a ban of prerecorded commercial speech delivered without an operator.

Carl R. Kolker, a manufacturer of automatic dialing systems, testified at the 17 December hearing that the vast majority of the telemarketing calls currently being placed would be unaffected by the TCPA. He estimated that at least 90 percent of these kinds of calls were placed by "predictive dialer systems," computers that dial many telephone lines at once and transfer answered calls to operators, who either deliver messages or invite the recipient to listen to prerecorded messages. The TCPA does not ban these types of calls; it instead restricts the direct transmittal

of recorded messages directly, without first requesting the listener's consent. Kolker estimated that these types of calls made up 10 percent of the telemarketing business. This evidence was unrefuted by defendants.

The statute also exempts other types of directly transmitted recorded messages. Direct transmittal of recorded commercial messages is permitted if the caller is a tax exempt nonprofit organization. 47 U.S.C. § 227(a)(3)(C). Non-commercial speech delivered in this manner is also permitted. 47 U.S.C. § 227(b)(2)(B)(i). Under the statute, therefore, non-commercial speech and even some commercial speech is unaffected and may be prerecorded and delivered by a telecomputer without an operator. The statute burdens only that commercial speech which is completely prerecorded and delivered for the purposes of realizing a profit. Yet non-commercial and nonprofit commercial prerecorded calls inflict the same degree of disturbance upon residential privacy as commercial prerecorded calls. They present the same concerns with filling answering machines and interfering with emergency, governmental and business telephone numbers that Congress noted specifically regarding the delivery of prerecorded commercial messages without operators.

The "end" targeted by the TCPA, therefore, would be a slight reduction in the number of unsolicited, invasive commercial calls placed to residential telephone subscribers. The means of accomplishing this, however, is the total suppression of commercial speech from businesses which transmit prerecorded messages and fail to use operators to introduce or read the messages--while non-commercial

speech and commercial speech delivered by nonprofit organizations is permitted. There are serious questions raised as to whether such a heavy burden upon this one kind of constitutionally protected commercial speech is an appropriate or reasonable fit to the limited accomplishment of reducing such a small percentage of the invasive calls targeted by Congress.

Furthermore, less burdensome options appear to be available that would address the concerns Congress expressed regarding calls being made to business lines, emergency care providers, and government agencies, and calls not disconnecting after engaging answering machines. Uncontroverted testimony presented at the hearing suggested that technological advances have been made in the telemarketing industry that alleviate many of these concerns. Congress could have required the automatic dialing devices to employ this advanced technology to reduce the interference to business lines, emergency care providers, government agencies, and answering machines. As noted above, the existence of less burdensome options was significant to the court in *Discovery Network*. The existence of such options in this case is equally significant.

b. Balance of Hardships

Upon determining that serious questions exist, the court must grant a preliminary injunction if it finds that the balance of hardships tips sharply in favor of the moving party. *Associated General Contractors*, 950 F.2d at 1411. Defendants assert that Congress served a strong public interest in curtailing telemarketing abuses and protecting

residents from invasions of privacy. If enforcement of the TCPA were enjoined, defendants claim that the balance of hardships would favor them because the public would continue to suffer these invasions of privacy Congress sought to prevent.

According to the evidence presented, the TCPA would-- at best--eliminate only one of every ten telemarketing calls made. The enhanced privacy would be even less significant if the for-profit automatic dialers silenced by the statute were subsequently put to use by those exempted from the effects of the law, e.g., tax exempt nonprofit organizations. Therefore, the hardship defendants speak of is the further delay in eliminating one of every ten or more telephone solicitations a person may receive.

While this court in no way diminishes the stated intent of Congress, and shares their respect for privacy and the desire to be protected from unsolicited interruptions in the home, the court cannot conclude that defendants' projected hardship of allowing one additional solicitation outweighs the potential hardship that would be imposed upon plaintiffs. The Supreme Court and the Ninth Circuit have recognized that the loss of first amendment freedoms--even for a short period--can constitute irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (plurality opinion); *San Diego Committee*, 790 F.2d at 1473 n.3. This court shares the reasoning in *Elrod* and *San Diego Committee* and agrees that first amendment infringements can have a profound impact, and regards the loss of plaintiffs' rights to express one form of commercial speech as a significant hardship.

Plaintiffs also presented evidence and testimony suggesting that enforcement of the TCPA would cause dramatic drops in revenue and would probably result in the loss of livelihoods. Mrs. Moser testified that 70 percent of her business was attributable directly to the use of the telecomputer system. This court finds that the balance of hardships tips sharply in plaintiffs' favor.

CONCLUSION

Having found that serious questions are raised by plaintiffs in this action, and that the balance of hardships tips strongly in plaintiffs' favor, this court grants plaintiffs' motion for a preliminary injunction enjoining the enforcement of 47 U.S.C. § 227(b)(1)(B), pending a determination of the constitutionality of the statute.

Dated this 22nd day of December, 1992.

James A. Redden
United States District Judge

PUBLIC LAW 102-243 [S. 1462]; December 20, 1991

TELEPHONE CONSUMER PROTECTION ACT OF 1991

SECTION 1. SHORT TITLE.

This Act may be cited as the "Telephone Consumer Protection Act of 1991".

SEC. 2. FINDINGS.

The Congress finds that:

(1) The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques.

(2) Over 30,000 businesses actively telemarket goods and services to business and residential customers.

(3) More than 300,000 solicitors call more than 18,000,000 Americans every day.

(4) Total United States sales generated through telemarketing amounted to $435,000,000,000 in 1990, a more than four-fold increase since 1984.

(5) Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.

(6) Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.

(7) Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.

(8) The Constitution does not prohibit restrictions on commercial telemarketing solicitations.

(9) Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.

(10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.

(11) Technologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer.

(12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents

to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

(13) While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

(14) Businesses have also complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls are a nuisance, are an invasion of privacy, and interfere with interstate commerce.

(15) The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls to businesses as well as to the home, consistent with the constitutional protections of free speech.

SEC. 3. RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT.

"(a) AMENDMENT.--Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end the following new section:

"SEC. 227. RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT.

"(a) Definitions.—As used in this section—

"(1) The term 'automatic telephone dialing system' means equipment which has the capacity—

"(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

"(B) to dial such numbers.

"(2) The term 'telephone facsimile machine' means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

"(3) The term 'telephone solicitation' means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

"(4) The term 'unsolicited advertisement' means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

"(b) RESTRICTIONS ON THE USE OF AUTOMATED TELEPHONE EQUIPMENT.—

"(1) PROHIBITIONS.—It shall be unlawful for any person within the United States—

"(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

"(i) to any emergency telephone line (including any '911' line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

"(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

"(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio

common carrier service, or any service for which the called party is charged for the call;

"(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

"(C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine; or

"(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

"(2) REGULATIONS; EXEMPTIONS AND OTHER PROVISIONS.--The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

"(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent; and

"(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection,

subject to such conditions as the Commission may prescribe—

"(i) calls that are not made for a commercial purpose; and

"(ii) such classes or categories of calls made for commercial purposes as the Commissioner determines—

"(I) will not adversely affect the privacy rights that this section is intended to protect;

"(II) do not include the transmission of any unsolicited advertisement.

"(3) PRIVATE RIGHT OF ACTION.—A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

"(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

"(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

"(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

"(c) PROTECTION OF SUBSCRIBER PRIVACY RIGHTS.—

"(1) RULEMAKING PROCEEDING REQUIRED.—Within 120 days after the date of enactment of this section, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall—

"(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific 'do not call' systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

"(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

"(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

"(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

"(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

"(2) REGULATIONS.—Not later than 9 months after the date of enactment of this section, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers."

[REMAINDER OF ACT OMITTED]

(2)

No. 94-1833

Supreme Court, U.S.
FILED
JUN 7 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

KATHRYN MOSER, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Congress, in establishing a general requirement that persons obtain consent before initiating prerecorded telephone messages, could constitutionally authorize the Federal Communications Commission to consider exemptions for noncommercial speech.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1833

KATHRYN MOSER, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 46 F.3d 970. The opinion of the district court (Pet. App. A13-A33) is reported at 826 F. Supp. 360.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1995. The petition for a writ of certiorari was filed on May 5, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, 105 Stat. 2394 (1991), addressed a number of problems created by technological advances in telemarketing. The provision at issue in this case, 47 U.S.C. 227(b)(1)(B) (Supp. V 1993), makes it unlawful "to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party." Congress enacted that prohibition as a "time, place, and manner restriction on speech." S. Rep. No. 178, 102d Cong., 1st Sess. 4 (1991). As the committee report explained, the basic prohibition "does not discriminate based on the content of the message" and "applies equally whether the automated message is made for commercial, political, charitable or other purposes." *Ibid.*

Although the statute applies to all types of speech, Congress authorized the Federal Communications Commission (FCC) to exempt certain calls through rulemaking if the agency concluded that exemptions were appropriate. The authority to make such exemptions extends to "calls that are not made for a commercial purpose," 47 U.S.C. 227(b)(2)(B)(i) (Supp. V 1993), and calls made for a commercial purpose that "will not adversely affect the privacy rights that [the prohibition] is intended to protect" and "do not include the transmission of any unsolicited advertisement," 47 U.S.C. 227(b)(2)(B)(ii) (Supp. V 1993).[1]

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[1] The term "unsolicited advertisement" is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any

After the TCPA was enacted, the FCC promulgated regulations that exempted certain categories of calls from the statutory restriction. 57 Fed. Reg. 48,333 (1992); 47 C.F.R. 64.1200(c). The regulations exempted any

> call or message by, or on behalf of, a caller:
>
> (1) That is not made for a commercial purpose,
>
> (2) That is made for a commercial purpose but does not include the transmission of any unsolicited advertisement,
>
> (3) To any person with whom the caller has an established business relationship at the time the call is made, or
>
> (4) Which is a tax-exempt nonprofit organization.

47 C.F.R. 64.1200(c).

2. Petitioners are the National Association of Telecomputer Operators and the Association's president, Kathryn Moser. They filed suit on November 12, 1992, alleging that Section 227(b)(1)(B) on its face violates the First Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. After entering a preliminary injunction enjoining enforcement of the statute, the district court granted summary judgment for petitioners. Pet. App. A13-A33. The court first noted (*id.* at A18-A19) that it lacked jurisdiction to review the regulations promulgated by the FCC that exempt noncommercial

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person without that person's prior express invitation or permission." 47 U.S.C. 227(a)(4) (Supp. V 1993).

calls from the scope of the statutory restriction, because review of FCC regulations lies exclusively in the courts of appeals. See 28 U.S.C. 2342; 47 U.S.C. 402(a). The court concluded, however, that it had jurisdiction to consider the constitutionality of the authorization to promulgate regulations. Pet. App. A18.

Turning to the merits, the court analyzed the statute under the criteria applicable to restrictions on commercial speech. Those factors look to whether the regulation at issue (1) implements a substantial governmental interest, (2) directly advances that interest, and is (3) narrowly tailored to achieve the desired objective. See *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 563-566 (1980).

The district court held that the statute violates the First Amendment, for two reasons. The court held that "there is no reasonable fit between the [statutory] goals" of protecting residential privacy and "the means chosen to reach those goals in the distinction Congress drew between commercial and noncommercial messages." Pet. App. A28. The court also held that, because most commercial telephone solicitations are today made by live solicitors and not by automated, prerecorded messages,[2] there is also no reasonable fit

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[2] The district court stated that "[e]vidence presented to this court indicates that the solicitations being banned by the TCPA make up less than three percent of the telemarketing calls received by Americans." Pet. App. A30. In our view, the court of appeals erred (*id.* at A8 n.4) in stating that the district court "adopted" the 3% figure as correct. Indeed, the district court went on to acknowledge the ambiguity in the evidence, stating that, "[u]nder any interpretation of the available evidence, the TCPA's promotion of residential privacy would

between the goal of protecting privacy and the statutory distinction between prerecorded messages, which are prohibited, and commercial messages introduced by an operator, which are not. *Id.* at A29-A32. In the district court's view, its result followed from this Court's decision in *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505 (1993).

3. The court of appeals reversed. Pet. App. 1a-12a. Initially, the court agreed with the district court that it had no jurisdiction to review the FCC's regulations establishing an exemption for certain noncommercial calls, and stated that it would therefore not review the FCC's regulations. *Id.* at. A7. The court explained that, "[b]ecause nothing in the statute requires the Commission to distinguish between commercial and noncommercial speech, * * * the statute should be analyzed as a content-neutral time, place, and manner restriction" on "all automated telemarketing calls without regard to whether they are commercial or noncommercial." *Id.* at A7-A8. The analysis of such restrictions, which is "essentially identical" to the analysis of regulation of commercial speech, *id.* at A8, requires consideration of whether the restrictions "are justified without reference to the content of the restricted speech, [whether] they are narrowly tailored to serve a significant governmental interest, and [whether] they leave open ample alternative channels for communication of the information." *Ibid.*, quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989).

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be by way of eliminating a very small percentage of the millions of telemarketing calls being made every day." *Id.* at A30.

The court of appeals noted that the government's "significant interest" in protecting residential privacy was undisputed, and that it was likewise undisputed "that curbs on telemarketing advance that interest." Pet. App. A8. The question therefore was "whether a ban on automated telemarketing calls is narrowly tailored to the residential privacy interest, and whether ample alternative channels of comunication remain open." *Id.* at A9.

With respect to the relationship between the statutory ban on automated telemarketing calls and the interest in residential privacy, the court held that "[t]he district court did not give sufficient weight" to Congress's "extensive findings" of "consumer concerns about telephone solicitation in general and about automated calls in particular." Pet. App. A9. Moreover, apart from the fact that Congress had cited concerns peculiar to prerecorded telephone solicitations, the court explained that the legislature was free to address one aspect of the telemarketing problem—the use of automated, prerecorded messages—without regulating all commercial telemarketing calls. *Id.* at A9-A10, citing *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696, 2707 (1993) (the courts do not "require that the Government make progress on every front before it can make progress on any front"); *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538, 2545 (1992) ("the First Amendment imposes not an 'underinclusiveness' limitation but a 'content discrimination' limitation upon a State's prohibition of proscribable speech").

Finally, the court noted that "[t]he restrictions in the Act leave open many alternative channels of communication, including the use of taped messages introduced by live speakers or taped messages to

which consumers have consented, as well as all live solicitation calls." Pet. App. A11. Because the statutory ban on automated telemarketing calls is content-neutral, is "narrowly tailored to advance" the government's interest in protecting residential privacy, and leaves open "ample alternative channels of communication," the court held that it does not violate the First Amendment. *Id.* at A12.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. Petitioners do not pursue their contention, rejected by the court of appeals (see Pet. App. A9-A10), that the statute impermissibly distinguishes between live and prerecorded telephone messages. Instead, petitioners argue that the statute is unconstitutional because it authorizes the FCC to make a distinction, under some circumstances, between commercial and noncommercial calls. See Pet. i, 12.

As the court of appeals recognized, this case does not squarely present the question whether Congress may distinguish by statute between commercial and noncommercial automated calls. The statute as enacted does not compel any distinction between commercial and noncommercial speech. As the Senate report explained, the statute "does not discriminate based on the content of the message" and "applies equally whether the automated message is made for commercial, political, charitable or other purposes." S. Rep. No. 178, *supra*, at 4. Accordingly, the question presented by this case is whether Congress may, consistent with the First Amendment, ban all auto-

mated calls. Since petitioners neither present that question in their petition nor otherwise argue that Congress lacks such power, review by this Court is not warranted.

2. Rather than attack Congress's power to ban all automated calls, petitioners argue that Congress's grant of authority to the FCC to distinguish between commercial and noncommercial automated telemarketing violates the First Amendment.

Initially, petitioners may not use this case to challenge the FCC's implementation of that authority, since any such challenge must be brought in the first instance in the court of appeals, not the district court. See 28 U.S.C. 2342; 47 U.S.C. 402(a); Pet. App. A6-A7.[3] Accordingly, the only question presented in this case is whether the bare grant of authority is constitutional. This Court has frequently cautioned against the premature and abstract resolution of constitutional issues. See, *e.g.*, *United States* v. *National Treasury Employees Union*, 115 S. Ct. 1003, 1019 (1995); *Ashwander* v. *TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring). In light of that principle, resolution of the question whether the grant of authority to the FCC violates the First Amendment should await a case in which that authority has been exercised by the FCC. See, *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1019-1020 (1984); *Pennell* v. *City of San Jose*, 485 U.S. 1, 10-11 (1988); *Hodel* v.

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[3] Following oral argument in the court of appeals, petitioners filed a petition for review of the FCC rulemaking in the court of appeals. The petition was dismissed as untimely. *Moser* v. *FCC*, No. 94-70835 (9th Cir. May 5, 1995).

Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 296-297 (1981).[4]

In any event, it is clear that the congressional grant of authority does not violate the First Amendment. A grant of authority to distinguish between commercial and noncommercial speech is valid so long as there is some possible set of circumstances under which that authority can be constitutionally exercised. Nothing in the commercial speech doctrine prohibits a distinction between commercial and noncommercial speech in all cases, regardless of the nature of the regulation at issue, the relative harm caused by the two types of speech, or the alternative means of communication open to commercial speakers. Indeed, the basic proposition that "speech proposing a commercial transaction is entitled to lesser protection than other constitutionally guaranteed expression," *Discovery Network*, 113 S. Ct. at 1513, leads directly to the conclusion that there can be situations in which commercial speech—but not noncommercial speech—could be regulated.[5] Accordingly, Congress's grant of authority to make such a distinction is constitutionally valid on its face.

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[4] Cf. *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 64 (1974) ("The question is not what sort of * * * requirements *might* have been imposed by the [agency] under the broad authority * * * in the Act, but rather what sort of * * * requirements [the agency] did *in fact* impose under that authority.").

[5] Far from establishing a general rule requiring identical treatment for commercial and noncommercial speech, this Court in *Discovery Network* stressed that its holding was "narrow" and did not address whether, under some circumstances, a community "might be able to justify differential treatment of commercial and noncommercial [messages]." 113 S. Ct. at 1516.

3. Even if the statute were understood to constitute a regulation of commercial—but not noncommercial—speech, it would not violate the First Amendment, as construed by this Court in *Discovery Network*. Indeed, the record in the present case bears no resemblance to that held inadequate to support special treatment for noncommercial speech in *Discovery Network*.

In *Discovery Network*, the City of Cincinnati, motivated by aesthetic and safety considerations, prohibited newsracks that dispensed commercial handbills. The City conceded that it could not ban all newsracks and recognized that only 62 of the approximately 1,500 to 2,000 existing racks would be removed as a result of its actions. 113 S. Ct. at 1510. The ban thus had a negligible impact on the aesthetic goals the City sought to achieve. Nor were the aesthetic and safety problems posed by commercial newsracks in any way distinguishable from those posed by other newsracks. The City argued, nevertheless, that, even if the impact on its stated goals was minimal, it could ban commercial newsracks solely because of the lesser protection accorded by the Constitution to commercial speech.

In invalidating the City's action, the Court focused on the fact that the distinction drawn by the City "b[ore] no relationship *whatsoever* to the particular interests that the city ha[d] asserted." 113 S. Ct. at 1514. The Court stressed that "[t]he benefit to be derived from the removal of 62 newsracks while about 1,500-2,000 remain in place" was "minute" and "paltry." *Id.* at 1510. Nor could the City's action be justified by any distinction between commercial and noncommercial newsracks, both of which were "equally unattractive." *Id.* at 1514. As the Court made

clear, there could be no justification for banning a vehicle of commercial speech when the ban would not meaningfully serve a legitimate end. Even so, the Court carefully limited its holding to the record before it. See note 5, *supra*.

The exemption provision of the statute at issue in this case presents the reverse of the situation before the Court in *Discovery Network*. Congress was aware that prerecorded solicitations, like telephone solicitations generally, are chiefly generated by commercial enterprises. H.R. Rep. No. 317, 102d Cong., 1st Sess. 16 (1991). The data before Congress showed that noncommercial calls generally constituted a relatively low volume of solicitations, and the noncommercial calls (which would include solicitations from schools, churches and charities) tended to be far more expected and thus less intrusive. *Ibid.* The threat to residential privacy posed by noncommercial calls was accordingly much less than that posed by commercial calls.

Moreover, Congress reasonably determined that, although commercial calls are generally found to be intrusive, individuals find automated telephone calls to be particularly disturbing. For example, a consumer survey that was before Congress indicated that telephone calls "from people selling things" were rated as "very annoying" by 67% of respondents and that "[o]nly phone calls from a computer trying to sell something were found to annoy more people (70 percent)." H.R. Rep. No. 317, *supra*, at 9.

Finally, although prerecorded commercial calls had constituted only a small percentage of telephone solicitations thus far, that does not mean that banning them served no legitimate purpose. Of course, the numerous state bans on such telephone calls—which

petitioners would allege are unconstitutional—no doubt served to limit the growth of this technology. And petitioners themselves acknowledge that the technology for making prerecorded solicitations is rapidly evolving. See Pet. 18 n.6. Congress reasonably could have legislated based on the perception that, if allowed to proliferate unchecked, the number and intrusiveness of prerecorded commercial solicitations would increase markedly and create an increasingly pronounced problem.

Petitioners cite (Pet. 15) the congressional finding that "residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy." See TCPA § 2(10), 105 Stat. 2394. That finding does not support petitioners' argument. Congress found evidence indicating that all types of prerecorded messages impinge on privacy. However, Congress recognized that its action was necessitated by the high volume of commercial telephone solicitations and was concerned to avoid unnecessary regulation of noncommercial speech. Congress was not constitutionally precluded from authorizing the FCC to consider whether noncommercial calls should be exempt where (1) such calls comprise a small percentage of prerecorded solicitations and (2) evidence before Congress indicated that the vast majority of consumer complaints concerned commercial messages.[6]

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[6] Petitioners also argue (Pet. 20-22) that the distinction between commercial and noncommercial messages violates the equal protection component of the Due Process Clause of the Fifth Amendment. That claim fails (particularly in the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1995

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context of the present facial challenge to the statute) for the same reasons as does petitioners' First Amendment claim.